Supreme Court, U.S.
FILED

(1) 96 208 MAY 21 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ARTHUR O. KLEIN,

Petitioner,

-against-

COLLARD & ROE, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

ARTHUR O. KLEIN
Pro Se
7 Half Mile Common
Westport, CT 06880
(203) 226-3269

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

10 pp

QUESTIONS PRESENTED

This petition presents the following questions:

1. Does not the "Summary Order" filed on February 20, 1996 dismissing the Petitioner's Appeal and the Order filed on February 21, 1996 denying the Petitioner's petition for a rehearing overrule and conflict directly with the pronouncements of this Court in *Thermtron Products, Inc. v. Hermansdorfer* 423 U.S. at 345 and 346 that Sections 1447 (c) and (d) "must be construed together" and furthermore these sections *are in pari materia* [and] are to be construed accordingly rather as distinct enactments . . . ".

2. Does not the Second Circuit's denial of the petitioner's petition for a rehearing without any further comment effectively reverse the above quoted pronouncements of *Thermtron* relied on by the petitioner because these pronouncements make it clear that certain sections *"are in pari materia"* which obviously also applies to 28 U.S.C. Section 1446(b) first and second paragraphs.

3. Does not the Second Circuit, by basing its decision on the pronouncements of this court in *Things Remembered* (U.S. Dec. 5, 1995) *Inc.*, ___ U.S. ___ (1995), 64 U.S.L.W. 4035, cited by the Respondent, and cited with approval by the Second Circuit as follows: *"Because [a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except [in Civil Rights actions]," we dismiss the defendants' appeal for want of jurisdiction."* overlook, ignore or de facto deny an other dicta of this court in *Things Remembered* in which this court made it clear that it did not intend to reverse

QUESTIONS PRESENTED – Continued

the core holding in *Thermtron*, namely, that: *"As we explained in Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), § 1447(d) must be read in ***pari materia*** *with § 1447(c) so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)."*

4. Can a Federal District Court Judge, who at the time of remanding the case back to the N.Y. Supreme Court, Nassau County, was presiding over a jury trial, *Healy v. Collard*, Civil Action No. 94 CV 4573 involving the President Allison C. Collard Esq. of the Respondent Collard and Roe Inc., treat the petitioner's § 1446(b) removal motion as a first paragraph of § 1446(b) motion when in fact the petitioner filed the removal motion exclusively on the basis of the second paragraph of #1446(b).

5. Can a Federal District Court Judge avoid appellate review by falsely designating the remand motion of the petitioner as an untimely removal motion under the first paragraph of § 1446(b) when in fact it was a timely motion solely made solely pursuant to the second paragraph of 28 U.S.C. § 1446(b).

RULE 29.6 STATEMENT

Petitioner, Klein & Vibber P.C. is a duly licensed professional corporation under the laws of the State of Connecticut.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

I. THE SECOND CIRCUIT DID NOT FOLLOW THE PRONOUNCEMENT OF THIS COURT IN *"THERMTRON"* "THAT THESE PROVISIONS ARE IN 'PARI MATERIA' AND ARE TO BE CONSTRUED TOGETHER" 9

CONCLUSION 12

APPENDIX

2ND CIRCUIT COURT OF APPEALS ORDER DISMISSING APPEAL A1

2ND CIRCUIT COURT OF APPEALS ORDER DENYING REHEARING A4

K&V'S ORIGINAL VERIFIED ANSWER AND COUNTERCLAIMS A6

K&V'S MOTION TO AMEND THE ANSWER AND COUNTERCLAIMS A14

TABLE OF CONTENTS – Continued

Page

JUDGE LOCKMAN'S ORDER DENYING K&V'S MOTION TO AMEND ANSWER AND COUNTER-CLAIMS A25

K&V'S COMPLAINT IN THE CONNECTICUT ACTION A27

ORDER BY JUDGE LOCKMAN ORDERING DEPOSITION OF ALLISON C. COLLARD ESQ. ON NOVEMBER 8 AND 9, 1994 ..... A36

K&V'S MOTION TO REMAND THE CASE FROM THE DISTRICT COURT OF CONNECTICUT TO THE DISTRICT FOR THE EASTERN DISTRICT OF N.Y. A38

ORDER BY JUDGE T.F. GILROY DALY DISMISSING CONNECTICUT ACTION A44

C&R'S MOTION TO REMAND THE CASE BACK TO THE N.Y. SUPREME COURT, NASSAU COUNTY .. A45

ORDER BY JUDGE WEXLER REMANDING THE CASE BACK TO THE N.Y. SUPREME COURT, NASSAU COUNTY A48

TABLE OF AUTHORITIES

Page

CASES

Fischer et al. v. United Air Lines Inc., et al., 218 F. Supp. 223 (U.S. District Court for the Southern District of New York, 1963) 11

Fuqua v. Gulf, Colorado and Santa Fe Railway Company et al., 206 F. Supp. at 816 (U.S. District Court of Oklahoma, 1962) 10

Gilardi v. Atchinson, Topeka and Santa Fe Railway Co., 182 F.2d at 84 (U.S. District Court of Illinois, 1960) 11

Healy v. Collard, Civil Action No. 94CV 4573 (Eastern District of N.Y.) 8, 10

Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. at 345 and 346 12

Things Remembered, Inc., ___ U.S. ___ (1995), 64 U.S.L.W. 4035 (U.S. Dec. 5, 1995) 11

CONSTITUTION

U.S. Constitution, Amendment V 2

STATUTES

15 U.S.C. § 1125 et seq. 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1441(a) 2, 6, 7

28 U.S.C. § 1441(c) 2

28 U.S.C. § 1446(a) 2

28 U.S.C. § 1446(b) first paragraph ... 3, 8, 9, 10, 11, 12

28 U.S.C. § 1446(b) second paragraph ... 3, 9, 10, 11, 12

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1447(b) 9

28 U.S.C. § 1447(c) 4, 11

28 U.S.C. § 1447(d) 4

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 2ND CIRCUIT

Petitioner respectfully prays for a writ of certiorari to review the Order of the United States Court of Appeals for the 2nd Circuit in appeal No. 95-7562, filed on February 20, 1996, dismissing the petitioner's appeal and the Order filed on February 21, 1996 denying the petition for a rehearing.

OPINIONS BELOW

The Orders of the Court of Appeals for the 2nd Circuit dated respectively February 20, 1996 and February 21, 1996 are unreported and are reprinted in the Appendix to this petition commencing at page A1. The Order by the District Court for the Eastern District of N.Y. is unreported and is reprinted in the Appendix commencing at page A4.

JURISDICTION

The Order which this Court is asked to review was filed on February 20, 1996. Rehearing was denied on February 21, 1996. This court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment V

"No person shall . . . be deprived of life, liberty or property, without due process of law. . . . "

28 U.S.C. Section 1441(a)

Except as others expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purpose of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

28 U.S.C. Section 1441(c)

Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more than otherwise non-removable claims or causes of action, the entire case may be removed and the district may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

28 U.S.C. Section 1446(a)

A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file

in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

28 U.S.C. Section 1446(b) first paragraph

The notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. Section 1446(b) second paragraph

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. Section 1447(c)

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such a case.

28 U.S.C. Section 1447(d)

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

This proceeding was commended in the Supreme Court of the State of N.Y., Nassau County, on a complaint filed by Collard & Roe Inc. (hereinafter "C&R") on or about March 25, 1992. C&R is, upon information and belief, a N.Y. Professional corporation. The verified complaint named Klein & Vibber P.C. and Arthur O. Klein, a Connecticut attorney residing in Westport, Connecticut (hereinafter "K&V"), as the defendants, and prayed for

money damages and an accounting. K&V is a Connecticut Professional Corporation whose sole stockholder is Arthur O. Klein.

Responding to the complaint, K&V filed a verified answer and counterclaim on May 11, 1992 (A6) denying the allegations of the C&R complaint. This verified answer also included three separate counterclaims alleging acts of unfair competition and common law trademark infringement on the part of C&R of the K&V common law trademark "Klein & Vibber™". A verified reply to K&V's counterclaims was then filed by C&R on or about April 14, 1993. K&V then filed a Motion in the Supreme Court of the State of N.Y., Nassau County on June 8, 1993 for leave to file an amended answer which included an additional proposed fourth counterclaim alleging newly discovered acts of unfair competition and trademark infringement on the part of C&R and alleging violations of 15 U.S.C. §1125 et seq. (the Lanham Act) (A14). This motion for leave to amend K&V's answer and counterclaims was denied on June 25, 1993 by the N.Y. Supreme Court, Nassau County (A25). K&V then brought an action for unfair competition and common law trademark infringement based on Lanham Act violations 15 U.S.C. §1125 et seq. against C&R on November 3, 1994 in the U.S. District Court for Connecticut (hereinafter the "Connecticut Action") (A27). The Connecticut Action included a count which corresponded to the fourth proposed counterclaim that K&V had attempted to introduce in the N.Y. action by way of the aforementioned Motion for leave to amend K&V's answer. C&R then filed a Motion To Dismiss the Connecticut Action and the U.S. District Court of Connecticut then issued an Order on

January 24, 1995 dismissing the Connecticut Action (A44). The Order by the U.S. District Court Judge in the Connecticut action included the following language:

"After careful review, and in light of the fact that the plaintiff's complaint involves the same parties, and the same claims and ***issues*** *as those raised in the New York Action, the instant motion is hereby GRANTED." (emphasis added).*

During the period from March 1992 to November 1994 both C&R and K&V engaged in intensive motion practice regarding discovery in N.Y. Supreme Court, Nassau County. Arthur O. Klein and one employee of K&V were repeatedly deposed by C&R during this period. However, K&V did not succeed to obtain **any** discovery, to depose Allison C. Collard Esq., and to obtain documents through discovery from C&R, both in the New York State action and in the Connecticut action, until an Order was issued by N.Y. Supreme Court, Nassau County requiring Allison C. Collard Esq., the president of C&R, to appear for his deposition on **November 8, 1994 and November 9, 1994** (A36). K&V deposed Allison C. Collard Esq. during those two days and then filed on December 2, 1994, based on the incomplete discovery finally obtained from C&R by means of the November 8 and 9, 1994 deposition of Allison C. Collard Esq., a Notice of Removal pursuant to 28 U.S.C. §1441(a) in the U.S. District Court of Connecticut. After having been informed by the clerk of the U.S. District Court of Connecticut that the Notice of Removal had been filed in the wrong venue, K&V promptly filed on **December 6, 1994** a Motion to Remand the case to the correct venue, namely to the U.S. District Court for the Eastern District of New York (A38). This was followed up

by filing a second Notice of Removal pursuant to 28 U.S.C. §1441(a) on January 30, 1995 in the U.S. District Court for the Eastern District of New York. The basis set forth by K&V and in both Notices of Removal was as follows:

"4. A large number of discovery requests were filed by defendants Arthur O. Klein and Klein & Vibber P.C. and all of said discovery requests have been ignored by plaintiff Collard & Roe P.C. until Judge Lockman of the Supreme Court of the State of New York issued an Order on October 25, 1994 requiring Allison C. Collard, the president of defendant Professional Corporation, to attend his deposition from November 8-10, 1994. (Exhibit B).

5. The testimony obtained by the plaintiff herein during this abbreviated deposition of Allison C. Collard Esq. on November 8 and 9, 1994 now makes it abundantly clear that this is a case which may be removed to this Court pursuant to 28 USC 1441. The defendant Collard & Roe P.C. has appeared in this action."

C&R then filed on February 14, 1995 with Judge Wexler of the U.S. District Court for the Eastern District of N.Y. a motion to remand the case back to the Supreme Court of N.Y., Nassau County (A45). C&R's motion to remand was based on the following allegation:

To remand to the Supreme Court of the State of New York, Nassau County, all proceedings in the subject action on the ground that the Petitioning Defendants failed to serve a Petition for Removal ***within thirty (30) days of the commencement of the State Court Action,*** *and on the further ground that 28 U.S. Code 1446 prohibits the removal of a case on the basis of jurisdiction more than one (1) year after commencement of the action." (emphasis added)*

Judge Wexler of the U.S. District Court, Eastern District of New York, then issued an Order on May 12, 1995 (A48) remanding the case back to the New York Supreme Court, Nassau County. This Order includes the following language of the first paragraph of 28 U.S.C. §1446(b) which explained the basis for the issuance of the Order of the court:

"A defendant seeking to remove an action from state to federal court must file a notice of removal in the appropriate district court ***"within thirty days after receipt by the defendant. . . . of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. §1446(b).*** *Defendants' papers in opposition to plaintiff's motion to remand indicate that plaintiff "initiated" [this] law suit in the N.Y. Supreme Court of New York, Nassau County in 1992." Defendants' Memorandum in Opposition, at 3. As such, defendants have failed to file a timely notice of removal." (emphasis added)*

At the time the Order was considered and issued by Judge Wexler he presided, upon information and belief, over a jury trial involving Allison C. Collard Esq., the president of C&R, entitled *Healy v. Collard* Civil Action No. 94-CV 4573.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT DID NOT FOLLOW THE PRONOUNCEMENT OF THIS COURT IN *"THERMTRON"* THAT "THESE PROVISIONS ARE IN 'PARI MATERIA' AND ARE TO BE CONSTRUED TOGETHER".

Thus C&R alleged and Judge Wexler completely accepted the allegation by C&R that K&V's original and subsequent Notices of Removal were based on the provisions contained in the first paragraph 28 U.S.C. 1447(b), namely that K&V's Notice of Removal was untimely because it was not filed within **"thirty days after receipt by the defendant. . . . of a copy of the initial pleading setting forth the relief upon which such an action or proceeding is based."** (emphasis added) which cites the language of **28 U.S.C. Section 1446(b) first paragraph.**

In fact K&V never relied on the provisions of the **first paragraph of 28 U.S.C. Section 1446(b)** but exclusively on the provisions of the **second paragraph of 28 U.S.C. Section 1446(b).** The First Notice of Removal was "filed" within "thirty days after receipt by the defendant . . . of a copy of an . . . other paper from which it may be first ascertained that the case is one which is or has become removable . . . ". This Notice of Removal was "filed" no later than December 6, 1994 in federal court system by requesting that the case filed in the District Court of Connecticut be remanded to the geographically correct district court of the United States "for the district and division within which such action is pending". This "filing" took the form of a Motion filed by K&V in the District Court of Connecticut to remand the civil action to the U.S. District Court for the Eastern District of New

York (A38). The fact that K&V had initially inadvertently selected the geographically incorrect district court is of no moment since that defect was cured by K&V before the expiration of the thirty days statute of limitations on December 9, 1994. the primary purpose of a statute of limitations is to give timely notice to the adverse party. Such notice was given within thirty days of taking the deposition of Allison C. Collard Esq. who was in no way prejudiced by the fact that the original Notice of Removal was, due to a good faith mistake, filed in the geographically incorrect district court. The petitioner timely notified the respondent on December 6, 1994 that the case was being transferred (remanded) to the geographically correct district court.

What propelled Judge Wexler to cite a portion of a statute (28 U.S.C. Section 1446(b) **first paragraph**), which K&V never cited or relied on, can not be ascertained from the record. It may be that Judge Wexler simply repeated the unfounded allegations of C&R without checking their accuracy, or it may be that this was due to some ex parte contacts during the jury trial of defendant Allison C. Collard Esq. before Judge Wexler in the *Healy v. Collard* Civil Action No. 94-CV 4573. The fact remains, however, that it is clear from the record that K&V removed the N.Y. Supreme Court, Nassau County Civil Action solely pursuant to (28 U.S.C. Section 1446(b) **second paragraph**). It has long been widely held and interpreted by the federal court system that "the other paper", as defined in 28 U.S.C. Section 1446(b) **second paragraph,** can mean a deposition obtained by a defendant during a litigation in a State Court Action. See *Fuqua v. Gulf, Colorado and Santa Fe Railway Company et al.* 206 F. Supp. at 816 (U.S. District

Court of Oklahoma, 1962; *Gilardi v. Atchison, Topeka and Santa Fe Railway Co.* 189 F.2d at 84 (U.S. District Court of Illinois, 1960). See also *Fisher et al. v. United Airlines Inc. et al.*, 218 F. Supp. 223 (U.S. District Court for the S.D. of New York, 1963).

It is therefore clear that, while K&V has consistently and exclusively relied in their Notices of Removal on the newly discovered information obtained during the deposition of Allison C. Collard Esq. on November 8 and 9, 1994 and the language of the **second** paragraph of 28 U.S.C. §1446(b), which authorizes the filing of a Removal Notice within thirty days of receiving "the other paper", C&R has consistently and repeatedly alleged in their Motions for Remand to the New York State Supreme Court, Nassau County, that K&V's Notices of Removal included a "defect in removal procedure" because K&V was not in compliance with the 30 days statute of limitations of the **first** paragraph of 28 U.S.C. §1446(b), which requires the filing of the Removal Notice within thirty days from receipt of the initial pleading in a State Court Action. To use one portion of a statute for the purpose of establishing a "defect", according to 28 U.S.C. Section 1447(c), to the exclusion of an other portion of the same statute, to achieve a desired goal, is contrary to a fair interpretation of the law and is also contrary to the pronouncements of this court in *Thermtron* which makes it clear that this group of statutes must be *"construed together. . . . These provisions, like their predecessors, are in 'pari materia' [and] are to be construed accordingly rather than as distinct enactments . . . " Thermtron at 345 and 346.* The Remand Order of Judge Wexler was therefore based on grounds not authorized in §1447(c). Moreover, the *Things*

Remembered Inc., ___ U.S. ___ (1995), 64 U.S.L.W. 4035 (U.S. Dec. 5, 1995) does not supplant the dicta of *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. at 346 because in *Things Remembered* at 4036 this court makes it clear that it did not intend to reverse the *"pari materia"* pronouncements of *Thermtron*.

CONCLUSION

Judge Wexler therefore remanded this case to the New York Supreme Court, Nassau County on the basis of a non-existent "defect" in the removal procedure. C&R urged the court below to so remand the case to the New York Supreme Court, Nassau County, based on this putative "defect". It is clear that the court below accepted on face value the misleading or erroneous representations on the part of C&R. If this Court sustains the Order of Remand by Judge Wexler, it would open the door for any U.S. District Court Judge to "invent" a "defect in removal procedure" and, by so relying on the non-applicable first paragraph of 28 U.S.C. 1446(b), make this paragraph paramount to the second paragraph of 28 U.S.C. 1446(b). Such a procedure is clearly not an interpretation in *"pari materia"* of the first and second paragraphs of 28 U.S.C. 1446(b).

For the foregoing reasons this court is urged to grant the petition for certiorari.

Respectfully submitted,

KLEIN & VIBBER P.C.

ARTHUR O. KLEIN
Federal Bar No. CT. 11360
CT. State Juris No. 101505
7 Half Mile Common,
Westport, Connecticut 06880

APPENDIX

AMENDED ORDER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Feb. 20, 1996)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of February one thousand nine hundred and ninety-six.

PRESENT: HONORABLE
THOMAS J. MESKILL,
HONORABLE
FRANK X. ALTIMARI,
HONORABLE
GUIDO CALABRESI,
Circuit Judges.

COLLARD & ROE INC.,

Plaintiff-Appellee,

-v.- 95-7562

KLEIN & VIBBER P.C.; ARTHUR O. KLEIN,

Defendants-Appellants.

APPEARING FOR APPELLANT: Arthur O. Klein, *pro se*, Westport, CT

APPEARING FOR APPELLEE: Solomon M. Lowenbraun, New York, NY

Appeal from the United States District Court for the Eastern District of New York (Wexler, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was submitted by appellant, *pro se*, and argued by counsel for appellee.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal from the District Court is hereby DISMISSED.

Collard & Roe, Inc. ("C & R") commenced this action in New York State Court in April of 1992. In January of 1995, defendants Klein & Vibber P.C. and Arthur O. Klein ("defendants") removed the case to federal court. By Order dated May 12, 1995, the district court (Wexler, J.) remanded this action to the Supreme Court of the State of New York pursuant to 28 U.S.C. § 1446(c) for failure to file timely notice of removal. *See* 28 U.S.C. § 1446(b) (notice must be filed "within thirty days after receipt by the defendant . . . of a copy of the initial pleading");

Things Remembered, Inc. v. Petrarca, ___ U.S. ___ (1995), 64 U.S.L.W. 4035 (U.S. Dec. 5, 1995) ("untimely removal [is] precisely the type of removal defect contemplated by § 1447(c)"). Defendants now appeal the district court's remand. Because "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except [in Civil Rights actions]," 28 U.S.C. § 1447(d), we dismiss the defendants' appeal for want of jurisdiction. *See Things Remembered, Inc.*, ___ U.S. ___ (1995), 64 U.S.L.W. 4035 (U.S. Dec. 5, 1995).

/s/ Thomas J. Meskill

/s/ Frank X. Altimari

/s/ Guido Calabresi
Circuit Judges.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

(Filed Feb. 21, 1996)

GEORGE LANGE III
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of February one thousand nine hundred and ninety-six.

Present:

Hon. Thomas J. Meskill
Hon. Frank X. Altimari
Hon. Guido Calabresi
CIRCUIT JUDGES,

95-7562 Collard & Roe Inc. v. Klein & Vibber P.C.

A petition for rehearing having been filed herein by Appellants Klein & Vibber P.C.; Arthur O. Klein.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT,
GEORGE LANGE III, Clerk
By: /s/ Arthur Heller
Arthur Heller
Administrative Attorney

Administrative Attorney

EXHIBIT B

SUPREME COURT OF THE STATE OF
NEW YORK, COUNTY OF NASSAU
----------X

COLLARD & ROE INC.

Plaintiff,

VS.

ARTHUR O. KLEIN and
KLEIN & VIBBER P.C.

Defendants.
----------X

Index No.
VERIFIED
ANSWER AND
COUNTERCLAIM

The defendants in the above-entitled action hereby answer the complaint as follows:

1. Defendants deny knowledge or information sufficient to form a belief concerning the truth of the allegations set forth in paragraph 1 of the complaint.

2. Defendants deny the allegations set forth in paragraph 2 and 4 of the complaint except admit that plaintiff was and is an attorney admitted to practice in the State of New York and that defendants entered into an agreement and refer the Court to such agreement for its terms and conditions.

3. Defendants deny the allegations set forth in paragraphs 5 through 10 of the complaint.

4. Defendants repeat and reallege the answers to the allegations made by plaintiff in paragraphs 1 through 9 of the complaint as if more fully set forth at length herein to the extent they are repeated in paragraph 11 of the complaint.

5. Defendants deny the allegations set forth in paragraphs 12 through 13 of the complaint.

6. Defendants deny the allegations set forth in paragraph 14 of the complaint except admit that the Commissioner of Patents and Trademarks Donald J. Quigg issued an Order on or about March 1989 suspending defendant Arthur O. Klein from practicing before the PTO for two years.

AS AND FOR A FIRST COUNTERCLAIM

7. At all times hereinafter mentioned defendant Arthur Klein was a resident of the State of Connecticut.

8. At all times hereinafter mentioned defendant Klein & Vibber PC. was a Connecticut professional corporation.

9. On information and belief, at all times hereinafter mentioned, plaintiff Collard & Roe, Inc., successor to Collard Roe & Galgano, Inc. was a professional corporation organized and existing under the laws of the State of New York.

10. On and about January 26, 1990 Collard Roe & Galgano P.C. ("CRG") and the defendants entered into an agreement and Memo of Understanding (the "Agreement" and the "Memo") whereunder the legal practices of the parties hereto were to be united under the terms and conditions of the Agreement and the Memo.

11. Plaintiff has breached the Agreement and the Memo during the period from about January 21, 1991 to July 15, 1991 and continuing in various aspects including but not limited to the following:

a. Failure of CRG to submit all billings to former clients of Klein & Vibber P.C. to Arthur O. Klein for approval prior to sending them to the clients;

b. Failure of CRG to supply Arthur O. Klein with a full time secretary for his use in connection with legal matters for the clients;

c. Failure to supply Arthur O. Klein with copies of all billings to the former clients of Klein & Vibber P.C.;

d. Failure to supply Arthur O. Klein with copies of the correspondence and filings on behalf of the former clients of Klein & Vibber P.C.;

e. Failure to return the client files of Klein & Vibber P.C. after the termination of the Agreement and Memo by Arthur Klein on July 15, 1991;

f. Failure of plaintiff to account to defendants for monies received from the former clients of defendants.

g. Failure of plaintiff to pay to defendants the monies due to him under the Agreement and the Memo.

12. From or about January 21, 1991 and up to July 15, 1991 the defendants notified CRG at least four times in writing and also orally of breaches by CRG of the terms of the Agreement and Memo.

13. Despite these notifications CRG refused to cure the breaches of the Agreement and Memo by July 15, 1991.

14. Defendants terminated the Agreement orally on July 15, 1991 and demanded that all the files of the

defendant Klein & Vibber P.C. be returned immediately to the offices of Klein & Vibber P.C. in Westport, Ct.

15. Since July 15, 1991 defendants have requested that files of the former clients of Klein & Vibber P.C. be turned over to two patent practitioners designated by the law firm of Klein & Vibber P.C. CRG has refused to return the files of Defendant Klein & Vibber P.C. to the Defendants and/or said patent practitioners.

16. As the result of the foregoing defendants have been damaged and there is due and owing from defendants to plaintiff the sum of $1,500,000, the return of the client files of defendants in plaintiff's possession and control, and the production of copies of the billings by plaintiff to the clients of defendants, and an accounting of all monies received.

AS AND FOR A SECOND COUNTERCLAIM

17. Defendants repeat and reallege each and every allegation contained in Paragraphs "7" through "15" inclusive, the same as if herein set forth at length.

18. On information and belief CRG has affixed a semblance of Arthur O. Klein's signature to a large number of letters to the clients of Klein & Vibber P.C. without the Defendant Arthur O. Klein's permission or knowledge, and with the intent to make the former clients of Klein & Vibber P.C. and the bank employees of the Connecticut Bank & Trust Co., where Defendants maintain bank accounts, believe that such letters had been authored by Defendant Arthur O. Klein.

19. Prior to the termination of the Agreement CRG used a letterhead having the law firm name of KLEIN & VIBBER P.C. in communicating with the former clients of Klein & Vibber P.C. This letterhead listed as the principal attorneys Arthur O. Klein, Allison C. Collard and Thomas M. Galgano. Prior to the termination of the Agreement CRG used the name of Klein & Vibber P.C. on a sign on the entrance door of the office building it occupies in Rosyln, N.Y. and on a sign in front of said building.

20. The Defendants have requested CRG since July 15, 1991 at least four times in writing to cease using the name of Klein & Vibber P.C. and cease holding itself out as being the law firm of Klein & Vibber P.C. or being affiliated with law firm of Klein & Vibber P.C. The latest such written request to CRG was made by Defendants on February 6, 1992.

21. Despite these written and oral requests CRG has, upon information and belief, continued, to communicate with the former clients of Klein & Vibber P.C., both orally and in writing, and has and is presently holding itself out as being the successor of the law firm of Klein & Vibber P.C. or being in some way connected or affiliated with Arthur Klein.

22. That such communications to the former clients of Klein & Vibber P.C. have grievously damaged the reputation and good will of law firm of Klein & Vibber P.C and Arthur Klein and whom defendants had represented for several decades.

23. As result of the foregoing plaintiff has been damaged in the sum of $1,500,000, and is entitled to a

permanent injunction restraining plaintiff from signing the name of Arthur O. Klein to any documents.

AS AND FOR A THIRD COUNTERCLAIM

24. Defendants repeat and reallege each and every allegation contained in Paragraphs "7" through "16" inclusive and "18" through "22" inclusive, the same as if herein set forth at length.

25. CRG maintained a separate checking account at the European American Bank in Roslyn, N.Y. for collection of billings of the former clients of Klein & Vibber P.C. and Defendant Arthur O. Klein and the disbursements of funds. Arthur Klein has a signature power on said account. Defendant Arthur O. Klein has demanded copies of all bank statements from CRG and European American Bank concerning said account and CRG and European American Bank, pursuant to a request by CRG, have refused to supply Arthur O. Klein with all such bank statements.

26. CRG has received at least $40,000 from former clients of Defendant Klein & Vibber P.C. in payment of bills which had been issued by Defendant Klein & Vibber P.C. prior to January 26, 1990 and has diverted said funds to the separate checking account at the European American Bank while withholding access to said account to Arthur Klein.

27. As a consequence of the diversion, CRG has converted to its own benefit a sum in excess of $40,000 belonging to Defendant Klein & Vibber P.C.

28. As a result has been damages in the sum of $40,000.

WHEREFORE, the Defendants demand judgment against CRG and its successor in interest as follows:

A. Dismissing the complaint.

B. On the first counterclaim damages in the sum of $1,500,000; the return of the client files of defendants and the furnishing of copies of all billings to the defendants' clients and an accounting for all monies received from the clients of defendants since January 26, 1990 to date.

C. On the second counter claim damages in the sum of $1,500,000 and a permanent injunction restraining plaintiff from signing the name of defendants to any document, and a permanent injunction restraining plaintiff from holding itself out as the successor in interest to Klein & Vibber P.C. or being in any way affiliated with the defendants.

D. On the third counterclaim damages in the sum of $40,000 and a direction that the plaintiff be directed to give plaintiff copies of all bank statements of the defendants account at the European American Bank in Roslyn, N.Y.

E. Such other and further relief as the Court may seem just and proper.

FOR THE DEFENDANTS
/s/ Arthur O. Klein
ARTHUR O. KLEIN
7 Half Mile Common
Westport, Ct. 06880
(203) 226-5521

To: Solomon Lowenbrau, Esq.
Attorney for Plaintiff

122 East 42 Street
New York, N.Y. 100168

SUPREME COURT OF THE
STATE OF NEW YORK,
COUNTY OF NASSAU

COLLARD & ROE INC. Plaintiff, VS. ARTHUR O. KLEIN and KLEIN & VIBBER P.C. Defendants.	Index No. 13235/92 FIRST AMENDED VERIFIED ANSWER AND COUNTERCLAIMS

State of Connecticut
County of Fairfield

The defendants in the above-entitled action hereby answer the complaint as follows:

1. Defendants deny knowledge or information sufficient to form a belief concerning the truth of the allegations set forth in paragraph 1 of the complaint.

2. Defendants deny the allegations set forth in paragraph 4 of the complaint except admit that plaintiff and defendants entered into an agreement and refer the Court to such agreement for its terms and conditions.

3. Defendants deny the allegations set forth in paragraphs 5 through 10 of the complaint.

4. Defendants repeat and reallege the answers to the allegations made by plaintiff in paragraphs 1-9 of the complaint as if more fully set forth at length herein to the

extent they are repeated in paragraph 11 of the complaint.

5. Defendants deny the allegations set forth in paragraphs 12 through 13 of the complaint.

6. Defendants deny the allegations set forth in paragraph 14 of the complaint except admit that the Commissioner of Patents and Trademarks Donald J. Quigg issued an Order on or about March 1989 suspending defendant Arthur O. Klein from practicing before the PTO for two years.

AS AND FOR A FIRST COUNTERCLAIM

7. On January 26, 1990 the law firm of Collard, Roe and Galgano P.C. (hereinafter referred to as "CRG") having an office in Roslyn, N.Y. and the defendants entered into and signed an agreement and a MEMO OF UNDERSTANDING (hereinafter referred to respectively as the as the [sic] "Agreement" and the "Memo").

8. The Agreement included the following termination clause "This clause shall survive the end of the agreement term, provided CRG is not in breach of the agreement."

9. From or about January 21, 1991 and up to July 15, 1991 the defendants notified CRG at least four times in writing and also orally of breaches by CRG of the terms of the Agreement and Memo.

10. Despite these notifications CRG refused to cure the breaches of the Agreement and Memo by July 15, 1991.

11. Defendants terminated the Agreement orally on July 15, 1991 and demanded that all the files of the defendant Klein & Vibber P.C. be returned immediately to the offices of Klein & Vibber P.C. in Westport, Ct.

12. Since July 15, 1992 defendants have requested that files of the former clients of Klein & Vibber P.C. be turned over to two patent practitioners designated by the law firm of Klein & Vibber P.C. CRG has refused to return the files of Defendant Klein & Vibber P.C. to the Defendants and/or said patent practitioners.

14. Pursuant to the Agreement defendant Arthur O. Klein "shall have the right to approve all billings to former clients of Defendant Klein & Vibber P.C."

15. Since the inception of the Agreement defendant Arthur O. Klein has demanded that all billings by CRG to former clients of Klein & Vibber P.C. be submitted to him for his approval.

16. On information and belief, CRG has refused to submit a substantial number of billings which CRG had forwarded to the former clients of Defendant Klein & Vibber P.C. for approval to Defendant Arthur Klein, and continues to refuse to supply copies of such billings to the Defendant Arthur Klein.

AS AND FOR A SECOND COUNTERCLAIM

17. Defendants repeat and reallege each and every allegation contained in Paragraphs "7" through "16" inclusive, the same as if herein set forth at length.

18. On information and belief CRG has affixed a semblance of Arthur O. Klein's signature to a large

number of letters to the clients of Klein & Vibber P.C. without the Defendant Arthur O. Klein's permission or knowledge, and with the intent to make the former clients of Klein & Vibber P.C. and the bank employees of the Connecticut Bank & Trust Co., where Defendants maintain bank accounts, believe that such letters had been authored by Defendant Arthur O. Klein.

19. Prior to the termination of the Agreement CRG used a letterhead having the law firm name of KLEIN & VIBBER P.C. in communicating with the former clients of Klein & Vibber P.C. This letterhead listed as the principal attorneys Arthur O. Klein, Allison C. Collard and Thomas M. Galgano. Prior to the termination of the Agreement CRG used the name of Klein & Vibber P.C. on a sign on the entrance door of the office building it occupies in Roslyn, N.Y. and on a sign in front of said building.

20. The Defendants have requested CRG since July 15, 1991 at least four times in writing to cease using the name of Klein & Vibber P.C. and cease holding itself out as being the law firm of Klein & Vibber P.C. or being affiliated with law firm of Klein & Vibber P.C. The latest such written request to CRG was made by Defendants on February 6, 1992.

21. Despite these written and oral requests CRG has, upon information and belief, continued, to communicate with the former clients of Klein & Vibber P.C., both orally and in writing, and has and is presently holding itself out as being the successor of the law firm of Klein & Vibber P.C. or being in some way connected or affiliated with Arthur Klein.

22. That such communications to the former clients of Klein & Vibber P.C. have grievously damaged the reputation and good will of law firm of Klein & Vibber P.C. and Arthur Klein and whom defendants had represented for several decades.

AS AND FOR A THIRD COUNTERCLAIM

23. Defendants repeat and reallege each and every allegation contained in Paragraphs "7" through "16" inclusive and "18" through "22" inclusive, the same as if herein set forth at length.

24. CRG maintained a separate checking account at the European American Bank in Roslyn, N.Y. for collection of billings of the former clients of Klein & Vibber P.C. and Defendant Arthur O. Klein and the disbursements of funds. Arthur Klein has a signature power on said account. Defendant Arthur O. Klein has demanded copies of all bank statements from CRG and European American Bank concerning said account and CRG and European American Bank, pursuant to a request by CRG, have refused to supply Arthur O. Klein with all such bank statements.

25. CRG has received at least $40,000 from former clients of Defendant Klein & Vibber P.C. in payment of bills which had been issued by Defendant Klein & Vibber P.C. prior to January 26, 1990 and has diverted said funds to the separate checking account at the European American Bank while withholding access to said account to Arthur Klein. The successor in interest of CRG has received at least at least [sic] $1780 from present clients of Defendant Klein & Vibber P.C. in payment of bills which

had been issued by Defendant Klein & Vibber P.C. subsequent to July 15, 1991.

26. That, as a consequence of the diversion of funds belonging to Klein & Vibber P.C., CRG and/or its successor in interest has converted to its own benefit a sum of at least about $42,000 belonging to Defendant Klein & Vibber P.C.

AS AND FOR A FOURTH COUNTERCLAIM

27. Defendant Klein & Vibber P.C. is a Professional Corporation which has been organized pursuant to the laws of the State of Connecticut. Its predecessor was formed as a partnership law firm by the name of Klein & Vibber in the year 1977. The Professional Corporation of Klein & Vibber P.C. was formed in the year 1986 and is the successor in interest of the partnership law firm of Klein & Vibber. The law firm of Klein & Vibber, both first as a partnership and then as a Professional Corporation, have continuously maintained an office at 7 Half Mile Common, Westport, Ct. since the year 1977.

28. First the law firm and then the Professional Corporation of Klein & Vibber has been continuously providing its clients with high quality legal services in the field of International Intellectual Property Law since the year 1977. As a result of providing such high quality services the law firm and Professional Corporation of Klein & Vibber have gained domestically and internationally a reputation of providing high quality services to its international and U.S. clients. The name "Klein & Vibber" has therefore acquired secondary meaning in the specialized field of Intellectual Property Law and the

name "Klein & Vibber" has acquired the status of a common law trademark.

29. Defendant Klein & Vibber P.C. has, pursuant to an agreement dated January 26, 1990, licensed Plaintiff under said common law trademark "Klein & Vibber" from January 26, 1990 to July 15, 1991.

30. Defendant Klein & Vibber P.C. terminated said trademark license for cause on July 15, 1991.

31. Plaintiff has, despite the termination of the agreement on July 15, 1991, which included a license of the common law trademark "Klein & Vibber", continued to hold itself out in interstate commerce and in commerce with the United States as being the law firm of Klein & Vibber P.C. or being affiliated with the law firm of Klein & Vibber P.C., thereby infringing said common law trademark of "Klein & Vibber" in violation of the Lanham Act, 15 United States Code § 1126.

32. Plaintiff has, despite the termination of the agreement on July 15, 1991, continued to prominently display at the main entrance of the office building in which Plaintiff's law firm is headquartered at 1077 Northern Boulevard, Roslyn, N.Y. the name and common law trademark "Klein & Vibber" thereby misleading the public, Defendants' clients, and the U.S. postal authorities to believe that Plaintiff continues to be affiliated with Defendants in violation of the Lanham Act, 15 U.S.C. § 1126.

33. Since July 15, 1991 Plaintiff has intercepted numerous mail from Defendants' clients which was erroneously addressed to Defendants' former address at 1077

Northern Boulevard, Roslyn, N.Y. in violation of the Lanham Act, 15, U.S.C. § 1126.

34. The plaintiff's infringing activities are deliberate and willful.

35. Defendant Klein & Vibber P.C. has suffered irreparable harm to their reputation and their common law trademark "Klein & Vibber" and will continue to suffer such irreparable harm if Plaintiff's infringing activity is not preliminarily and permanently enjoined

AS AND FOR A FIFTH COUNTERCLAIM

36. Defendants repeat and reallege each and every allegation contained in Paragraphs 24-35 the same as if herein set forth at length.

37. Upon information and belief Plaintiff has used since July 15, 1991 a special account at the European American Bank in Roslyn, New York which includes the unauthorized and infringing use of Defendant Klein & Vibber P.C.'s common law trademark "Klein & Vibber". Despite repeated requests to close said account and stop said infringing use Plaintiff has willfully and deliberately continued to infringe Defendant Klein & Vibber P.C.'s trademark "Klein & Vibber" by maintaining said account bearing Defendant's common law trademark in violation of the Lanham Act, 15 U.S.C. § 1126.

38. This infringing use has caused Defendants irreparable harm.

AS AND FOR A SIXTH COUNTERCLAIM

39. Defendants repeat and reallege each and every allegation contained in paragraphs 24 to 37 the same as if herein set forth at length.

40. Upon information and belief Plaintiff has converted Defendants' funds and has collected substantial sums of money due to the law firm of Klein & Vibber P.C. for work performed long after the termination of the CRG-K&V affiliation on July 15, 1991 by maintaining an account at the European American Bank which includes Defendant's common law trademark "Klein & Vibber", thereby misleading Klein & Vibber P.C.'s clients to believe that they can pay money due to Klein & Vibber P.C. by making payments to said account in the European American Bank in violation of the Lanham Act, 15 U.S.C. § 1126.

41. This misleading of Klein & Vibber P.C.'s clients has caused Defendants irreparable harm.

WHEREFORE, the Defendants demand judgment against CRG and its successor in interest as follows:

A. Dismissing the complaint.

B. On the first counterclaim

C. On the second counterclaim

D. On the third counterclaim

E. On the fourth counterclaim

F. On the fifth counterclaim

G. On the sixth counterclaim

B, C, E, F & G. The sum of $1,500,000.00 as punitive damages for the damages incurred by

Defendants Arthur O. Klein and Klein & Vibber, P.C. as a result of the acts of unfair competition and common law trademark infringement as set forth herein.

B. That CRG and its successor in interest be directed to surrender copies of all unpaid billings and copies of all files of the former clients of Klein & Vibber P.C. to the Defendants and/or patent practitioners designated by the law firm of Klein & Vibber P.C.

C. That CRG and its successor in interest be restrained and enjoined from holding itself out as being the successor in interest or being affiliated in any way with the Defendants Klein & Vibber P.C. and Arthur O. Klein.

D. That CRG and its successor in interest be directed to make an accounting to the Defendants including the surrender of all bank statements from January 26, 1990 to the present time of the law firm of Collard, Roe and Galgano P.C., Collard & Roe P.C. and of the special checking account at the European American Bank which uses the defendants' common law trademark "Klein & Vibber".

E & F. For an Order of this Court enjoining Plaintiff from further infringing Defendant Klein & Vibber P.C.'s common law trademark "Klein & Vibber".

Such other and further relief as the Court may seem just and proper.

FOR THE DEFENDANTS
/s/ Arthur O. Klein
ARTHUR O. KLEIN
7 Half Mile Common
Westport, Ct. 06880
(203) 226-5521

Sworn to and subscribed before me this 18th day of September 1993

/s/ Gregory S. Slomba

(Seal)

EXHIBIT C

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present: HON. JOHN S. LOCKMAN, Justice

Collard & Roe, Inc., Plaintiff(s), -against- Arthur O. Klein and Klein & Vibber, P.C., Defendant(s).	TRIAL/IAS, PART 9 NASSAU COUNTY INDEX NUMBER: 13235/92 MOTION DATE: 6/25/93 CAL.NO.:

The following papers read on this motion to strike answer and counterclaims and cross-motion to serve answer,

Notice of Motion/Order to Show Cause 1, x 2
Answering Affidavits 3
Replying Affidavits 4
Briefs:
Plaintiff's/Petitioner's x
Defendant's/Respondent's x

Upon the foregoing papers, it is ordered that this motion by plaintiff to strike defendant's answer and counterclaims is denied.

Cross-motion to serve an amended answer is denied.

Contrary to plaintiff's contention, it appears that the deposition in this matter broke down because of the mutual disrespect exhibited by the parties to each other.

There was provocation on both sides. Counsel for plaintiff insisted on posing questions unrelated to the defendant witness' knowledge but rather to his future behavior, and repeatedly cut off the witness from answering. The witness ultimately refused to answer any more questions and left. Although the witness' answers evidence failing recollection on material issues, and may be unsatisfactory and frustrating, they do not present a basis for dismissal of his answer. However defendant is directed to appear for a further deposition after he has been permitted to review the files of Klein & Vibber, P.C. The deposition shall be conducted at the courthouse and continued to completion. It is noted that the advice of defendant Klein to his part-time bookkeeper regarding the subpoena served by plaintiff is not a sanctionable matter and plaintiff has even failed to show that such advice was unlawful. Indeed the copy of the subpoena submitted by plaintiff is a subpoena duces tecum, not ad testificandum, and plaintiff fails to elucidate regarding the methods of required services.

Requests for relief for which a notice has not been served will not be considered by the court.

Dated August 31, 1993 /s/ John S. Lockman
J.S.C.

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF CONNECTICUT

KLEIN & VIBBER P.C. Plaintiff, vs. COLLARD & ROE INC. Defendant.	Civil Action No. 94 Civ. (Filed Nov. 3, 1994)

COMPLAINT

Plaintiff, for his Complaint against defendant, alleges:

JURISDICTION AND VENUE

1. This is a civil action arising under the Trademark Act of 1946, as amended, commonly known as the Lanham Act, and the common law of the State of Connecticut, for violation of the Lanham Act, common law trademark infringement and unfair competition by reason of false descriptions and representations and false designation of origin. Plaintiff seeks interim and permanent relief and monetary damages.

2. This Court has jursidiction [sic] over the subject matter of this action pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), pursuant to 28 U.S.C. §§ 1331 and 1332 and upon this Court's supplemental jurisdiction over substantial related state law claims for relief.

3. Venue of this action lies in this Judicial District pursuant ot [sic] 28 U.S.C. § 1391.

THE PARTIES

4. Plaintiff Klein & Vibber P.C. (hereinafter K&V) is a Professional Corporation of the State of Connecticut having its principal place of business at 7 Half Mile Common, Westport, Ct. 06880. K&V is an internationally recognized intellectual property law firm which was formed in the year 1977. K&V provides consultation and legal services to U.S. and foreign clients in the areas of intellectual property law. The president of K&V is Arthur O. Klein, a member in good standing of the Bar of the State of Connecticut and of this court.

5. Defendant Collard & Roe Inc., formerly known as Collard, Roe and Galgano P.C. and also known as Collard & Roe P.C. (hereinafter C&R) is, upon information and belief, a Professional Corporation of the State of New York having its principal place of business at 1077 Northern Boulevard, Roslyn, N.Y. 11576. C&R is a law firm specializing in intellectual property law which provides consultation and legal services to U.S. and foreign clients. Allison C. Collard is, upon information and belief, a member of the Bar of the State of New York and the president of C&R.

COUNT I

VIOLATION OF LANHAM ACT SECTION 43(a)

6. As a result of extensive correspondence with domestic and in particular foreign clients by K&V since the year 1977, during which K&V has rendered consultation and legal services of high quality in the intellectual property law field to a large and primarily foreign clientele, the

law firm name and tradename **"Klein & Vibber"** has become well known here and abroad and has acquired the status of a "common law service trademark." As a result of such extensive use by K&V of K&V's common law trademark **"Klein & Vibber"** it properly identifies the goodwill and quality of the services which K&V sells and markets to the U.S. and foreign clients by means of the use of its common law trademark. The international clientele of K&V and other prospective national and international clients active in international intellectual property law forming the consuming public have come to recognize through asscociation [sic] with K&V, and through word of mouth, that the services it buys from K&V, which bear the **"Klein & Vibber"** common law trademark, will always have the high quality that its users have come to expect. The common law trademark of **"Klein & Vibber"** therefore constitutes a valuable asset of K&V which is being used to identify services available exclusively through K&V.

7. K&V and C&R entered into a written agreement (hereinafter the agreement) on January 26, 1990. Pursuant to this agreement all of the K&V files, the K&V library, and miscellaneous furniture and equipment of K&V, were transferred shortly after January 26, 1990 from the former N.Y office of K&V to the office of C&R in Roslyn, N.Y.

8. The agreement called for the affiliation of the K&V law firm and professional corporation with C&R and, in the event of full compliance by C&R of certain provisions of the agreement over a period of five years, the full absorption of K&V into C&R thereafter. K&V notified C&R of certain breaches of the agreement by C&R in the years 1990 and 1991 and, after C&R failed to cure the

breaches, K&V formally terminated the agreement on July 15, 1991.

9. At all times during the life of the agreement and since July 15, 1991 K&V remained a Professional Corporation of the State of Connecticut and maintained an office in the State of Connecticut and continued to do business with some of the clients of K&V.

10. At all times during the life of the agreement and since July 15, 1991, K&V maintained contact with all of its clients, both foreign and domestic, and held itself out as the same K&V which had previously represented these clients in the past.

11. On July 15, 1991 or promptly thereafter K&V informed all, and only all, of its clients of the dissolution of the K&V-C&R affiliation and demanded the return in writing and orally of all of the files of K&V. C&R has refused to return the K&V files and, upon information and belief, retains possession of the K&V files up to the present.

12. On July 15, 1991 or promptly thereafter, K&V instructed the U.S. postal authorities of forwarding all mail addressed to K&V and/or Arthur O. Klein to the offices of K&V in Westport, Ct.

13. Upon information and belief, C&R and/or Allison C. Collard continues since July 15, 1991 to intercept, receive and open mail addressed to K&V and/or Arthur O. Klein.

14. Upon information and belief, C&R and/or Allison C. Collard continues since July 15, 1991 to intercept, receive and convert funds belonging to K&V.

15. Upon information and belief, C&R and/or Allison C. Collard continues since July 15, 1991 to hold itself out as being or being affiliated with the law firm or Connecticut Professional Corporation of K&V, in particular with respect to its K&V clients.

16. Upon information and belief, C&R and/or Allison C. Collard continues since July 15, 1991 to prominently display on the front door of a building located at 1077 Northern Blvd. Roslyn, N.Y. the **"Klein & Vibber"** common law trademark.

17. Upon information and belief C&R has maintained since about February 1990 and continues to maintain a checking account at the European American Bank in Roslyn, N.Y. which includes the common law trademark **"Klein & Vibber"**.

18. The services sold by defendant and the services sold by plaintiff, as defined in paragraphs 1 and 2 supra, flow through the same channels of trade, and the common law trademark and tradename **"Klein & Vibber"** used by defendant has the same spelling and appearance as the aforedescribed trademark and tradename of plaintiff, which causes confusion in the purchasing public as to the source of origin of the respective services rendered by both parties.

19. The use of the tradename and common law trademark **"Klein & Vibber"** by C&R constitutes a reproduction, counterfeit, copy and colorable imitation of K&V's tradename and trademark.

20. Since July 15, 1991 without right, license or authorization from K&V, C&R has held itself out as being affiliated with K&V or the successor of K&V.

21. C&R's use of the common law trademark and tradename **"Klein & Vibber"** constitutes a false designation of origin which is damaging to K&V.

22. Purchasers of legal and consultation services in the international intellectual property law field are likely to assume, contrary to fact, that C&R is the origin of such services or that K&V's services are licensed, endorsed, authorized, or in some way related to or affiliated or connected with C&R.

23. Purchasers and prospective purchasers of K&V's genuine legal and consultation services are likely to assume, contrary to fact, that they can purchase K&V's services from C&R.

24. By reason of C&R's actions and activities as set forth hereinabove, C&R has committed violations of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which violations have caused damage to K&V.

25. C&R's identification and distribution in commerce of its consultation and legal services labelled in violation of Section 43(a) of the Lanham Act has caused and is causing irreparable damage and injury to K&V and such conduct is likely to continue unabated unless C&R is enjoined and restrained by this Court.

26. K&V has no adequate remedy at law.

COUNT II

COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

27. K&V hereby adopts and realleges the allegations set forth in paragraphs 1-21 hereof.

28. C&R's actions and activities, as set forth hereinabove, also constitute trademark infringement and unfair competition under the laws of the State of Connecticut and at common law.

29. C&R's acts of common law infringement and unfair competition have caused and are causing irreparable damage and injury to K&V and such acts and activities are likely to continue unabated unless C&R is enjoined and restrained by this Court.

WHEREFORE, K&V demands judgment against C&R and prays for judgment and order that:

A. C&R, its officers, directors, agents, servants, employees, and all persons in active concert and participation with them, including C&R's clients and customers, who receive actual notice of the order by personal service or otherwise, shall be enjoined by preliminary and permanent injunction and restrained from, in any manner, directly or indirectly promoting, advertising, exporting, displaying, offering for sale or otherwise distributing or alienating any K&V clients or prospective clients of K&V.

B. C&R shall send immediate notice to all persons, companies, or other entities who C&R has communicated with by holding itself out as being K&V or being in any way affiliated with K&V or who have used and/or purchased any services from C&R or from K&V through

C&R as a result of its past affiliation with K&V, that henceforth correspondence is to be conducted with K&V at its offices in Westport, Connecticut and all payments to K&V are to be made to K&V's checking account at the Fleet Bank in Westport, Ct.

C. Requiring C&R to cease said infringing use and destruction of any printed material and other physical indicia bearing the **"Klein & Vibber"** tradename and trademark.

D. Returning to K&V all of its files, library and other equipment.

E. C&R shall account for all moneys belonging to K&V which C&R converted during its affiliation with K&V from January 26, 1990 to July 14, 1991 and pay over to K&V, all profits which C&R has derived, and all damages which K&V has suffered, by reason of C&R's use of the **"Klein & Vibber"** tradename and trademark after July 14, 1991, and that such damages which K&V has suffered by reason of the **"Klein & Vibber"** tradename and trademark use by C&R since July 15, 1991, be trebled in accordance with 15 U.S.C. § 1117.

F. This case shall be deemed an exceptional case and C&R shall pay K&V the reasonable attorney's fees it incurred in the action, as well as its costs, in accordance with 15 U.S.C. § 1117.

/s/ Arthur O. Klein
Arthur O. Klein,
Federal Bar No. CT 11360
Ct. State Juris No. 101505
c/o Klein & Vibber P.C.
7 Half Mile Common
Westport, Ct. 06880

Of Counsel:
Sanford C. Nadler
Klein & Vibber P.C.
7 Half Mile Common
Westport, Ct. 06880

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Complaint, was mailed by express mail to Collard & Roe P.C. at 1077 Northern Boulevard, Roslyn, N.Y. 11576 the defendant herein by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service, addressed to:

Collard & Roe P.C., 1077 Northern Boulevard, Roslyn, N.Y. 11576.

this 3RD day of NOVEMBER, 1994

/s/ Arthur O. Klein

EXHIBIT U

COLLARD & ROE

V

ARTHUR O. KLEIN & KLEIN & VIBBER P.C.

13235/92
STIPULATION/
ORDER

The parties agree to the following disclosure and agree do have this Stipulation "so ordered".

Chaya Belfor, part time employee of Klein & Vibber, P.C., shall appear for deposition on November 7, 1994 at the office of Solomon M. Lowenbraun, 122 East 42 Street, N.Y. N.Y., Suite 800, at 10:00 a.m., her deposition not to exceed two hours. Following Chaya Belfor, the deposition of plaintiff, Allison C. Collard as president of Collard & Roe, P.C. shall commence and continue day to day until completed, except his deposition shall not continue beyond the close of business on November 9, 1994.

This matter is adjourned on the T.A.P. calendar to December 1, 1994, subject to the calendar of the Justice presiding.

/s/ Solomon M. Lowenbraun

/s/ Arthur O. Klein

Pursuant to telephone and fax notice by the parties, the above dates for deposition are amended to read – November 8, 1994 for the deposition of Chaya Belfor, and the deposition of Allison Collard shall not continue beyond November 10, 1994.

DATED: MINEOLA, NEW YORK
OCTOBER 25, 1994

/s/ John S. Lockman
J.S.C.

EXHIBIT B

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF CONNECTICUT

COLLARD & ROE P.C. Plaintiff, vs. KLEIN & VIBBER P.C. et al. Defendant.	Civil Action No. 394 CVO 02053 PCD (Filed Dec. 6, 1994)

MOTION TO REMAND THIS CIVIL ACTION TO THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Pursuant to Fed. R. Civ. P. 11 of the FRCP the defendant Arthur O. Klein requests that this case be remanded to the U.S. District Court for the Eastern District of N.Y.

The undersigned pro-se defendant has overlooked the provisions of the 28 U.S.C. §1446(a) which require the removal notice of State Court Action be filed in the district court of the United States for the district and division within which such action is pending. The Supplemental Notice of removal attached hereto, which is being submitted in lieu of a memorandum of law, together with the previously filed papers serve to comply with the requirements of FRCP 11. Upon information and belief the correct U.S. District Court for the initlal [sic] removal is the Eastern District of N.Y. despite the fact

that a parallel case Civil Action No. 394 CV 1861 TFGD is pending in this court (Waterbury).

Defendant

/s/ Arthur O. Klein

Arthur O. Klein
7 Half Mile Common
Westport, Connecticut 06880
(203) 226-3269

UNITED STATES DISTRICT COURT
OF THE DISTRICT OF CONNECTICUT

COLLARD & ROE P.C. Plaintiff, vs. KLEIN & VIBBER P.C. et al. Defendant.	Civil Action No. 394 CVO 02053 PCD (Filed Dec. 6, 1994)

MEMO IN SUPPORT

SUPPLEMENTAL NOTICE OF REMOVAL PURSUANT TO 28 USC 1446 (b)

TO THE CLERK OF THE ABOVE ENTITLED COURT:

PLEASE TAKE NOTICE that defendants Arthur O. Klein and Klein & Vibber P.C., a Connecticut Professional Corporation, hereby removed to this Court the state court action described below.

1. On or about March 23, 1992 an action was commenced in the Supreme Court of the State of New York, Nassau County entitled Collard & Roe Inc. (hereinafter (C&R), a New York Professional Corporation v. Arthur O. Klein and Klein & Vibber P.C. (hereinafter K&V), a Connecticut Professional Coporation [sic], Index Number 13235/92.

2. This action is a civil action of which the Court has original jurisdiction under 28 USC 1331 and one which may be removed to this court by plaintiff pursuant to the provisions of 28 USC 1441 (b) in that it arises under the

Lanham Act, 15 USC 1051-1127, see second counterclaim of Klein & Vibber's Answer and Counterclaim.

3. Alternately, this action is a civil action of which this Court has original jurisdiction under 35 USC 1332 and one which may be removed to this Court by plaintiff pursuant to the provisions of 28 USC 1441 (b) in that it is a civil action between citizens of different states and the matter in controversy exceeds the sum of $3,000,000. See "WHEREFORE CLAUSE" of plaintiff's Answer and Counterclaim.

4. A large number of discovery requests were filed by defendants Arthur O. Klein and Klein & Vibber P.C. (hereinafter "K&V) and all of said discovery requests have been ignored by plaintiff Collard & Roe P.C. until Judge Lockman of the Supreme Court of the State of New York issued an Order on October 25, 1994 requiring Allison C. Collard, the president of defendant Professional Corporation, to attend his deposition from November 8-10, 1994.

5. Attached hereto as exhibit "A" is the MEMORANDUM IN OPPOSITION TO CROSS-MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND IN OPPOSITION TO MOTION FOR LACK OF JURISDICTION AND VENUE OVER THE DEFENDANTS FILED on December 5, 1994 in the related civil action Klein & Vibber, P.C. v. Collard & Roe P.C. Civil Action 3:94 CV 1861 TFGD.

6. 28 U.S.C. § 1446 (b) states in pertinent part that:

"If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty day after receipt by the defendant, through service or otherwise, of a copy or

otherwise, of an amended pleading, motion, or order or other paper from which it may be ascertained that the case is one which is or ahs [sic] *become removable. . . . "*

Initially it should be noted that the pleadings Collard & Roe Inc., a New York Professional Corporation v. Arthur O. Klein and Klein & Vibber P.C., a Connecticut Professional Coporation [sic], Index Number 13235/92 (hereinafter the " '235" action) were never closed for the following reasons: After K&V and Arthur O. Klein filed its verified answer and counterclaim in the '235 action, C&R filed a verified reply in the '235 action which was signed and sworn to by Solomon M. Lowenbraun Esq. who was the attorney of record in the '235 action. Since the verified reply was not signed by the plaintiff herein but by his attorney the verified reply is a nullity the pleadings were never closed in the '235 action. The second count of defendant's counterclaim set forth allegations which define a cause of action for trademark infringement and unfair competition which is cause of action *"from which it may be ascertained that the case is one or has become removable." (28 U.S.C. §1446(b)*. The basis for the removal is entirely founded on 28 U.S.C. §1331 (federal question: Lanham Act). Therefore the removal is timely under 28 U.S.C. 1446(b)

7. On June 8 1993 the defendant herein filed a Motion to obtain leave from the Court to permit defendant to file three supplemental counterclaims which were based on *"additional transactions and occurrences which have just been discovered and occurred subsequent to the filing of defendant's answer and the filing of defendant's counterclaims 1-3."* (Exhibit B). This motion was denied by the Court on June 23, 1993. (Exhibit C). The three supplemental counts 4-6 constitute *"an amended pleading, motion, or order or other*

paper from which it may be ascertained that the case is one which is or ahs [sic] *become removable."* The basis for the removal is entirely founded on 28 U.S.C. §1331 (federal question): Lanham Act). Therefore the removal is timely under 28 U.S.C. §1446(b).

Respectfully submitted,

Dated: December 6, 1994

/s/ Arthur O. Klein
Arthur O. Klein,
Federal Bar No. CT 11360
Ct. State Juris No. 101505
KLEIN & VIBBER, P.C.
Attorneys for Plaintiff
7 Half Mile Common
Westport, Ct. 06880
(203) 226-3269

cc: Solomon Lowenbraun Esq.
122 East 42nd Street
N.Y. N.Y. 10168

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Supplemental NOTICE OF REMOVAL PURSUANT TO 28 USC 1441(b) and/or (c) (Federal Question and/or Diversity) was mailed, postage prepaid, this 6th day of, December 1994 to:

Solomon Lowenbraun Esq.
122 East 42nd Street
N.Y. N.Y. 10168

/s/ Arthur O. Klein
Arthur O. Klein

January 24, 1995. Civ. No. 3:94CV02053 (TFGD).

After careful review and for the reasons set forth below, the instant motion to remand is hereby GRANTED. 28 U.S.C. § 1446 provides that a "defendant . . . desiring to remove any civil action . . . from a State court shall file *in the district court of the United States for the district and division within which such action is pending* a notice of removal. . . . " (Emphasis added.) In the instant matter, the defendant has purported to remove an action to the District of Connecticut when the action was pending in a New York state court. Accordingly, the removal was improper and this matter is hereby ORDERED remanded to the Supreme Court of the State of New York, Nassau County. In light of this Ruling, all pending motions, including the motion for sanctions, are hereby DENIED without prejudice to renewal in a court of competent jurisdiction.

SO ORDERED.

/s/ T.F. Gilroy Daly

T.F. Gilroy Daly, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

COLLARD & ROE, P.C.,

Plaintiff,

-against-

ARTHUR O. KLEIN and
KLEIN & VIBBER, P.C.,

Defendants.

----------x

Index Number
CV 95 430
(LDW)

NOTICE OF
MOTION

SIR:

PLEASE TAKE NOTICE, that the undersigned will move in the United States District Court for the Eastern District of New York, at the Courthouse, 300 Rabro Drive, Hauppauge, New York 11788, on the ___ day of March 1995, on the Affidavit of SOLOMON M. LOWENBRAUN, ESQ., sworn to the 14th day of February 1995, and on the Order of T.F. GILROY DALY, U.S.D.J., dated January 24, 1995, and upon all the prior pleadings and proceedings had heretofore herein, for an Order:

a. To declare null and void a purported Notice of Removal of an action pending in the Supreme Court of the State of New York, Nassau County, bearing Index Number 13235/1992 entitled:

COLLARD & ROE, P.C., Plaintiff,

- against -

ARTHUR O. KLEIN and
KLEIN & VIBBER, P.C., Defendants;

b. To remand to the Supreme Court of the State of New York, Nassau County, all proceedings in the subject action on the ground that the Petitioning Defendants failed to serve a Petition for Removal within thirty (30) days of the commencement of the State Court Action, and on the further ground that 28 U.S. Code 1446 prohibits the removal of a case on the basis of jurisdiction more than one (1) year after the commencement of the action; and

c. For the Court to consider whether the Defendants in the State Action should be required to Show Cause Why they should not be sanctioned for the frivolous, repeated untimely attempt to remove the subject action from the State Court, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
February 14, 1995

Yours, etc.,

SOLOMON M. LOWENBRAUN,
(SML 9567)
Attorney for Plaintiff
122 East 42nd Street
New York, New York 10168
212-697-2293

TO:

ARTHUR O. KLEIN,
For ARTHUR O. KLEIN, PRO SE
And for KLEIN & VIBBER, P.C.,
Defendants herein
7 Half Mile Common
Westport, Connecticut 06880

CLERK,
United States District Court
Eastern District of New York
300 Rabro Drive
Hauppauge, New York 11788

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

COLLARD & ROE, INC.,

Plaintiff,

-against-

KLEIN & VIBBER P.C. and
ARTHUR O. KLEIN,

Defendants.
----------X

ORDER
CV 95-0430
(Wexler, J.)

APPEARANCES:

SOLOMON M. LOWENBRAUN, ESQ.
Attorney for Plaintiff
122 East 42nd Street
New York, New York 10168

ARTHUR O. KLEIN, ESQ.
Attorney for Defendants
7 Half Mile Common
Westport, Connecticut 06880

WEXLER, District Judge

The parties listed above have been enmeshed in an action in the Supreme Court of the State of New York, Nassau County since April 1992. Defendants purportedly removed that matter to this Court by filing notice of removal in January 1995. Presently before this Court is plaintiff's motion to remand the matter to state court.

A defendant seeking to remove an action from state to federal court must file a notice of removal in the appropriate district court "within thirty days after receipt by the defendant . . . of a copy of the initial pleading setting forth the claim for relief upon which such action

or proceeding is based." 28 U.S.C. § 1446(b). Defendants' papers in opposition to plaintiff's motion to remand indicate that plaintiff "initiated [this] law suit in the N.Y. Supreme Court of New York, Nassau County in 1992." Defendants' Memorandum in Opposition, at 3. As such, defendants have failed to file a timely notice of removal.

For the above reasons, plaintiff's motion to remand is granted. The removal was improper and this matter is hereby remanded to the Supreme Court of the State of New York, Nassau County.

SO ORDERED.

/s/ Leonard D. Wexler
LEONARD D. WEXLER
UNITED STATES
DISTRICT JUDGE

Dated: Hauppauge, New York
May 12, 1995